

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MARC SPITZER, Chairman
4 JIM IRVIN
5 WILLIAM A. MUNDELL
6 JEFF HATCH-MILLER
7 MIKE GLEASON

In the matter of:)	DOCKET NO. S-03489A-03-0000
)	
KATHLEEN WHORLEY SOMMER)	NOTICE OF OPPORTUNITY FOR HEARING
[CRD No. 2750036],)	REGARDING PROPOSED ORDER TO
d/b/a Sommer & Associates)	CEASE AND DESIST, ORDER FOR
249 W. Waltann Lane)	RESTITUTION, FOR ADMINISTRATIVE
Phoenix, Arizona 85023)	PENALTIES, OF REVOCATION AND FOR
)	OTHER AFFIRMATIVE ACTION
And JOHN DOE, husband and wife,)	
)	
RESPONDENTS.)	

12 **NOTICE: EACH RESPONDENT HAS 10 DAYS TO REQUEST A HEARING**
13 **EACH RESPONDENT HAS 30 DAYS TO FILE AN ANSWER**

14 The Securities Division ("Division") of the Arizona Corporation Commission ("Commission")
15 alleges that Respondent Kathleen Whorley Sommer ("SOMMER"), has engaged in acts, practices and
16 transactions that constitute violations of the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* (the
17 "Securities Act").

18 **I.**

19 **JURISDICTION**

20 1. The Commission has jurisdiction over this matter pursuant to Article XV of the
21 Arizona Constitution and the Securities Act.

22 **II.**

23 **RESPONDENTS**

24 2. SOMMER became an Arizona-registered securities salesman, associated with WMA
25 Securities, Inc., on May 30, 1996. Her association with WMA terminated on December 31, 1997,
26 and she then became registered in association with Jefferson Pilot Securities Corporation ("Jefferson

Pilot”), effective March 3, 1998. SOMMER voluntarily terminated association with Jefferson Pilot, effective October 31, 2000. She became registered in association with SunAmerica Securities, Inc. (“Sunamerica”) on November 7, 2000.

3. Sunamerica discharged SOMMER for engaging in private securities transactions without the approval of the dealer, on June 26, 2002. On June 28, 2002, SOMMER delivered to the Division a voluntary surrender of her registration. Accordingly, pursuant to A.R.S. § 44-1963(D), SOMMER continues to be subject to actions by the Commission under Article 10 of the Securities Act (in particular, A.R.S. § 44-1962) for conduct that began prior to the termination of her registration. The effective date of SOMMER’s registration termination is July 1, 2002, and SOMMER has not been registered in Arizona since that date.

4. At times relevant to this Notice, SOMMER did business as “Sommer & Associates.”

5. SOMMER holds a license to transact insurance business in the State of Arizona.

6. During the period relevant to this Notice, SOMMER has been a resident of Arizona. Her last known address is 249 West Waltann Lane, Phoenix, Arizona 85023.

7. JOHN DOE was at all relevant times the spouse of SOMMER. JOHN DOE is joined in this action under A.R.S. § 44-2031(C), solely for purposes of determining the liability of the marital community. The Division believes that the address of JOHN DOE is the same as that of SOMMER.

8. At all times relevant, SOMMER and JOHN DOE were acting for their own benefit, and for the benefit of, or in furtherance of, their marital community.

III.

FACTS

9. During the period between August 1999 and August 2001, SOMMER sold unregistered, investment contract securities, in the form of pay telephones and related service contracts. The investment contracts were issued and/or marketed by Alpha Telecom, Inc. (“Alpha”), American Telecommunications Company, Inc. (“ATC”), Strategic Partnership Alliance,

1 LLC, and/or SPA Marketing, LLC (collectively, "SPA"). Alpha and ATC may be collectively
2 referred to in this Notice as "Alpha/ATC."

3 10. At all times material to this Notice, Alpha was an Oregon corporation located at
4 2751 Highland Avenue, Grants Pass, Oregon 97526.

5 11. At all times material to this Notice, ATC was a Nevada corporation, formed as a
6 wholly owned subsidiary of Alpha on or about September 17, 1998. Originally named ATC, Inc.,
7 the name was changed to American Telecommunications Company, Inc., in or about the first half
8 of 2000. Its address was originally the same as Alpha's, but was later changed to 620 S.W. 4th
9 Street, Grants Pass, Oregon 97526, then to 2900 Vine Street, Suite J, Grants Pass, Oregon 97526,
10 and then to 942 S.W. 6th Street, Suite G, Grants Pass, Oregon 97526.

11 12. At all times material to this Notice, Paul S. Rubera ("Rubera") was the president and
12 control person of Alpha, and the control person of ATC.

13 13. At all times material to this Notice, Alpha, ATC, SPA, and their affiliates, sold pay
14 telephones with telephone service agreements, pursuant to which the investors would share in the
15 profits of the pay telephones. Through the pay telephone investment program, Alpha/ATC and/or
16 SPA raised approximately \$135 million nationwide, from 7,000 investors, between 1997 and 2001.

17 14. ATC's primary role was marketing the contracts to investors. Alpha's main focus
18 was obtaining telephone sites and installing, servicing, and managing the telephone s.

19 15. In or about early 1999, ATC engaged SPA as its independent marketing and sales
20 firm(s). SPA thereafter was responsible for contracting with, training, and supervising sales agents
21 for the purpose of selling the pay telephone contracts. After SPA came on board, ATC remained as
22 the processing center for the contracts, while Alpha continued to perform the service and
23 maintenance of the pay telephones.

24 16. In 1999 SOMMER, directly or indirectly, entered into agreements with Alpha,
25 ATC, and/or SPA, pursuant to which SOMMER sold investment contracts involving Alpha/ATC
26 pay telephones (the "Alpha investment contracts") within or from the state of Arizona.

1 17. Alpha/ATC sales agents, including SOMMER, claimed the pay telephones were
2 specially designed to accommodate the needs of persons with disabilities. In this way, the sales
3 agents, including SOMMER, convinced investors that the investment contracts provided an
4 opportunity to help persons with disabilities, and to qualify for a tax credit, as well as an
5 opportunity to realize a high return on invested funds.

6 18. An investor who purchased an Alpha/ATC pay telephone would execute two
7 agreements: a purchase agreement, and a service agreement with Alpha to manage the pay
8 telephone. Sales agents of Alpha/ATC, including SOMMER, presented and promoted the two
9 agreements simultaneously. The agreements offered four options for servicing the pay telephones,
10 for the investor to consider. The four options ranged from “Level 1,” in which Alpha would
11 provide minimal services and the investor would have to perform substantial work to manage the
12 pay telephone, to “Level 4,” in which Alpha would provide all necessary services, including
13 choosing a site and installing the pay telephone, collecting all revenue from the pay telephone’s
14 operation, and cleaning and repairing the pay telephone when necessary. Under Level 4, Alpha
15 would split the net proceeds with the investor on a 70/30 basis, with Alpha retaining 70% and the
16 investor receiving 30%.

17 19. The agreements provided that, only if the investor selected the “Level 4” service
18 option, the investor would have the option to recover his/her principal, by requiring ATC to buy the
19 investor’s telephone at the original purchase price. This provision was referred to as the “buyback
20 option.” (If the option were exercised within 36 months of the investment, a penalty would reduce
21 the buyback price.) If the investor selected any of the first three levels of service, s/he would have
22 no right to recover the principal invested by selling the pay telephone to ATC.

23 20. The price of the pay telephones was the same regardless of the service option
24 chosen, \$5,000.00 per telephone. No known investor who purchased a pay telephone through
25 SOMMER chose a company other than Alpha to manage his/her pay telephone, or chose a service
26 level other than Level 4. The investors to whom SOMMER sold Alpha investment contracts,

1 lacked expertise in the business of owning and managing pay telephones. The role of the investors
2 was limited to investing capital and collecting a return on the investment.

3 21. Alpha/ATC sales agents, including SOMMER, declared that an investor's "typical
4 return" on a pay telephone would amount to 14% per year. In practice, all investors received
5 \$58.34 per month per pay telephone purchased, which amounted to exactly 14% per annum, rather
6 than receiving an amount related to the revenue generated by any particular pay telephone.

7 22. SOMMER told prospective investors that the Alpha/ATC investment was virtually
8 risk-free and completely liquid, because of ATC's buyback obligation. Beginning not later than
9 May 1, 2000, SOMMER added the representation that the Alpha/ATC investment was safe because
10 the buyback obligation was insured by solid insurance companies. To some investors, SOMMER
11 named, or provided documents which named, the Northern and Western Insurance Company of
12 Grand Turk, Turks and Caicos Islands, British West Indies ("N&W"). SOMMER also named, or
13 provided documents which named, Lloyd's of London and/or other insurance companies, listed as
14 re-insurers of ATC's promise. In fact, if any such insurance existed at all, it was "excess" coverage
15 – ATC was supposed to cover the first \$2,000,000 of buyback claims. N&W was a captive
16 insurance company wholly owned by Paul S. Rubera, the president and control person of
17 Alpha/ATC, and Robert S. Harrison of Richmond, Texas. N&W was not authorized to write
18 insurance in Arizona during the relevant time period. SOMMER did not disclose those facts to
19 investors. Neither ATC nor any insurance company has ever honored any SOMMER investor's
20 exercise of the "buyback option," despite timely demand. ATC did not pay \$5,000 per telephone,
21 and no insurance company paid \$5,000 per telephone, to any SOMMER investor.

22 23. On information and belief, Alpha/ATC and/or SPA paid commissions to the sales
23 agents, including SOMMER, ranging from 12% to 19% per pay telephone sold.

24 24. Between August 1999 and August 2001, within or from the state of Arizona,
25 SOMMER sold Alpha investment contracts involving approximately 180 pay telephones to
26 approximately 49 investors. The investors were residents of Arizona, New Jersey, and

1 Pennsylvania. SOMMER sold Alpha investment contracts to these investors without having made
2 any suitability analysis, or any inquiry of the investors designed to assess the suitability of Alpha
3 investment contracts for the investors. SOMMER raised a total of approximately \$900,000 for
4 Alpha/ATC, for which she received commissions totaling at least \$125,000.

5 25. During the period when she was offering and selling Alpha investment contracts to
6 investors, SOMMER was a registered representative, first of Jefferson Pilot, and later of
7 Sunamerica. SOMMER did not obtain the approval of either dealer to act as a sales agent for
8 Alpha investment contracts. The sales of Alpha investment contracts that SOMMER made, were
9 not recorded on the books and records of either dealer. SOMMER sold Alpha investment contracts
10 to at least one customer of each dealer, as well as to investors who were not customers of either
11 dealer.

12 26. Alpha/ATC has a long regulatory history in which state and federal securities
13 regulators have found that these pay telephones and accompanying service contracts are
14 unregistered securities in the form of investment contracts, and consequently have ordered
15 Alpha/ATC and those working with it to cease and desist from offering or selling pay telephones in
16 the relevant jurisdictions. SOMMER did not disclose these regulatory actions or orders to
17 investors to whom she offered Alpha investment contracts. The actions or orders that SOMMER
18 could have revealed include:

- 19 ▪ February 2, 1999, Summary Order to Cease and Desist issued by Pennsylvania
20 Securities Commission, in *Matter of Alpha Telcom, Inc., et al.*, No. 9812-06.
- 21 ▪ June 30, 1999, Temporary Order of Prohibition issued by Illinois Secretary of State, in
22 *Matter of Alpha Telcom, Inc.*, No. 9900201, followed by Consent Order of Prohibition,
23 Alpha agreeing to offer rescission to all Illinois investors, on January 14, 2000.
- 24 ▪ July 21, 1999, Administrative Complaint filed, and Order to Cease and Desist issued by
25 South Carolina Attorney General, Securities Division, *In re Paul Rubera and Alpha*
26

1 *Telcom, Inc.*, File No. 99042, followed by consent Order to Cease and Desist on
2 October 7, 1999.

- 3 ▪ November 17, 1999, Summary Order to Cease and Desist issued by North Carolina
4 Secretary of State, in *Matter of the North Carolina Securities Division v. ATC, Inc.,*
5 *Paul Rubera, et al.*, File No. 99-038-CC.
- 6 ▪ November 24, 1999, Cease and Desist Order issued by Wisconsin Department of
7 Financial Institutions, in *Matter of Alpha Telcom, Inc. and Paul S. Rubera, et al.*, No. S-
8 99225(EX).
- 9 ▪ March 7, 2000, Temporary Cease and Desist Ordered issued by Rhode Island
10 Department of Business Regulation, in *Matter of Alpha Telcom, Inc. and ATC, Inc.*
- 11 ▪ July 18, 2000, Florida Department of Banking and Finance filed an administrative
12 action against Alpha, ATC, and Rubera, seeking a Cease and Desist Order, Matter Nos.
13 0504-I-6/00, 0504a-I-6/00, 0504b-I-6/00.
- 14 ▪ October 23, 2000, Desist and Refrain Order issued by California Department of
15 Corporations, to Rubera, Alpha and ATC.
- 16 ▪ November 28, 2000, Notice of Opportunity for Hearing issued by Ohio Department of
17 Commerce, in *Matter of Alpha Telcom, Inc.*
- 18 ▪ May 7, 2001, Administrative Complaint filed by Indiana Securities Division, and Cease
19 and Desist Order issued by Indiana Secretary of State, in *Matter of Alpha Tel-Com, Inc.,*
20 *et al.*

21 27. On August 24, 2001, Alpha/ATC sought bankruptcy protection in Florida, pursuant
22 to Chapter 11 of the United States Bankruptcy Code. A court-appointed receiver subsequently
23 took over the remaining operations of Alpha/ATC, and examined its accounting records.

24 28. Among regulatory actions that have proceeded against Alpha/ATC after SOMMER
25 appears to have ceased to offer or sell Alpha investment contracts, is the SEC's enforcement action
26 brought in the United States District Court for the District of Oregon, *SEC v. Alpha Telcom, Inc., et*

1 *al.*, No. CV 01-1283 PA. The District Court issued a Temporary Restraining Order on August 27,
2 2001, and a Preliminary Injunction on September 6, 2001. The defendants, other than Rubera,
3 consented to entry of judgments against them. The Court entered a consent judgment against ATC
4 and SPA on November 5, 2001, and entered a consent judgment against Alpha on February 8,
5 2002, imposing permanent injunctions and other relief.

6 29. The SEC's case against Rubera was tried to the Court, sitting without a jury. In an
7 Opinion (including Findings of Fact and Conclusions of Law), issued on February 7, 2002, the
8 United States District Court, District of Oregon, found that: "From July 1, 1998 through June 30,
9 2001, Alpha's payphone program failed to generate revenue sufficient to cover the cost of phone
10 charges and site commissions." The Court further found that during just the one-year period from
11 July 1, 2000, to June 30, 2001, the Alpha investment contract program lost approximately \$1
12 million. As discussed above, Alpha paid each investor a return of 14% on invested funds, despite
13 the unprofitability of the pay telephones. The Court found that Alpha had borrowed from ATC to
14 meet its cash flow needs, and the Court further found that ATC's sole source of revenue was
15 money from new investors. Accordingly, the Alpha investment contract program was in fact, a
16 Ponzi scheme during the period when SOMMER was offering and selling Alpha investment
17 contracts to investors.

18 30. Alpha made its last monthly payments, to some or all investors, in or about July,
19 2001.

20 IV.

21 VIOLATION OF A.R.S. § 44-1841

22 (Offer or Sale of Unregistered Securities)

23 31. From on or about August 1999 through August 2001, SOMMER offered and sold
24 securities in the form of investment contracts, within or from Arizona.

25 32. The securities referred to above were not registered pursuant to Article 6 or Article 7
26 of the Securities Act.

33. This conduct violates A.R.S. § 44-1841.

V.

VIOLATION OF A.R.S. § 44-1991

(Fraud in Connection with the Offer or Sale of Securities)

34. In connection with the offer or sale of securities within or from Arizona, SOMMER directly or indirectly: (i) employed a device, scheme or artifice to defraud; (ii) made untrue statements of material fact or omitted to state material facts which were necessary in order to make the statements made not misleading in light of the circumstances under which they were made; or (iii) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon offerees and investors. SOMMER's conduct includes, but is not limited to, the following:

a. SOMMER failed to advise investors of state regulatory actions and/or orders against Alpha/ATC, including without limitation those listed above, and failed to advise investors of the potential consequences of those actions and/or orders with respect to their investment;

b. SOMMER represented to investors that their buyback options and ability to get back from ATC the \$5,000 per pay telephone they had invested, made the investment risk-free and fully liquid, when it was not, in fact, safe or liquid;

c. From at least May 1, 2000, SOMMER represented to investors that their buyback options were fully insured, when they were not, in fact, insured;

d. SOMMER represented to investors that monies they would receive as a result of their investment in Alpha/ATC investment contracts would be derived from profits from the operations of particular pay telephones, when in fact the returns paid to investors amounted to exactly 14% per annum regardless of the profitability of any particular pay telephone and came from new telephone purchases by subsequent investors; and/or

e. SOMMER failed to disclose to offerees that their invested funds would be used by Alpha/ATC to make payments to earlier investors.

35. This conduct violates A.R.S. § 44-1991.

VI.

REMEDIES PURSUANT TO A.R.S. § 44-1962

(Denial, Revocation or Suspension of Registration of Salesman; Restitution, Penalties, or other Affirmative Action)

36. SOMMER's conduct is grounds to revoke SOMMER's registration as a securities salesman with the Commission pursuant to A.R.S. § 44-1962. Specifically, SOMMER:

- a. Engaged in conduct specified by A.R.S. § 44-1962(A)(2), in that she violated a provision of the Securities Act by selling unregistered securities within or from Arizona;
- b. Engaged in conduct specified by A.R.S. §§ 44-1962(A)(2) and 44-1962(A)(9), in that she violated A.R.S. § 44-1991, as detailed in the preceding count and in this Notice as a whole; and/or
- c. Engaged in dishonest or unethical practices in the securities industry, as specified by A.R.S. § 44-1962(A)(10) and A.A.C. R14-4-130(A). SOMMER's conduct in this regard includes, but is not limited to, the following:
 - i. SOMMER recommended and sold Alpha investment contracts to investors without having made any suitability analysis, or any inquiry of the investors designed to assess the suitability of Alpha investment contracts for the investors, conduct defined as dishonest or unethical by A.A.C. R14-4-130(A)(4); and/or
 - ii. SOMMER effected sales of securities that were not recorded on the books and records of the dealer with which she was associated at the time of the sales, conduct defined as dishonest or unethical by A.A.C. R14-4-130(A)(17).

37. SOMMER's conduct is grounds to assess restitution, penalties and/or take appropriate affirmative action pursuant to A.R.S. § 44-1962. Specifically, SOMMER has engaged in dishonest or unethical conduct in the securities industry.

VII.

REQUESTED RELIEF

The Division requests that the Commission grant the following relief:

1. Order SOMMER to cease and desist permanently from violating the Securities Act, pursuant to A.R.S. §§ 44-2032 and/or 44-1962;
2. Order SOMMER to take affirmative action to correct the conditions resulting from her acts, practices or transactions, including a requirement to make restitution pursuant to A.R.S. §§ 44-2032 and/or 44-1962;
3. Order SOMMER to pay the state of Arizona administrative penalties of up to five thousand dollars (\$5,000) for each violation of the Securities Act, pursuant to A.R.S. § 44-2036;
4. Order the revocation or suspension of SOMMER's registration as a securities salesman pursuant to A.R.S. § 44-1962;
5. Order SOMMER to pay the state of Arizona administrative penalties, pursuant to A.R.S. § 44-1962;
6. Order that the marital community of SOMMER and JOHN DOE be subject to any order of restitution, rescission, administrative penalties, or other appropriate affirmative action pursuant to A.R.S. § 25-215; and
7. Order any other relief that the Commission deems appropriate.

VIII.

HEARING OPPORTUNITY

SOMMER and/or JOHN DOE may request a hearing pursuant to A.R.S. § 44-1972 and A.A.C. R14-4-306. **If either Respondent requests a hearing, that Respondent must also answer this Notice.** A request for hearing must be in writing and received by the Commission within 10

1 business days after service of this Notice of Opportunity for Hearing. Each Respondent who
2 requests a hearing must deliver or mail the request to Docket Control, Arizona Corporation
3 Commission, 1200 W. Washington, Phoenix, Arizona 85007. A Docket Control cover sheet must
4 accompany the request. A cover sheet form and instructions may be obtained from Docket Control
5 by calling (602) 542-3477 or on the Commission's Internet web site at
6 www.cc.state.az.us/utility/forms/index.htm.

7 If a request for a hearing is timely made, the Commission shall schedule the hearing to begin
8 20 to 60 days from the receipt of the request unless otherwise provided by law, stipulated by the
9 parties, or ordered by the Commission. If a request for a hearing is not timely made the Commission
10 may, without a hearing, enter an order granting the relief requested by the Division in this Notice of
11 Opportunity for Hearing.

12 Persons with a disability may request a reasonable accommodation such as a sign language
13 interpreter, as well as request this document in an alternative format, by contacting Shelly M.
14 Hood, Executive Assistant to the Executive Secretary, voice telephone number 602/542-3931, e-
15 mail shood@cc.state.az.us. Requests should be made as early as possible to allow time to arrange
16 the accommodation.

17 IX.

18 ANSWER REQUIREMENT

19 Pursuant to A.A.C. R14-4-305, if SOMMER or JOHN DOE requests a hearing, SOMMER
20 or JOHN DOE must deliver or mail an Answer to this Notice of Opportunity for Hearing to
21 Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona
22 85007, within 30 calendar days after the date of service of this Notice. A Docket Control cover
23 sheet must accompany the Answer. A cover sheet form and instructions may be obtained from
24 Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at
25 www.cc.state.az.us/utility/forms/index.htm.

Additionally, SOMMER or JOHN DOE must serve the Answer upon the Division. Pursuant to A.A.C. R14-4-303, service upon the Division may be made by mailing or by hand-delivering a copy of the Answer to the Division at 1300 West Washington, 3rd Floor, Phoenix, Arizona, 85007, addressed to Amy Leeson.

The Answer shall contain an admission or denial of each allegation in this Notice and the original signature of the answering Respondent, or his/her attorney. A statement of a lack of sufficient knowledge or information shall be considered a denial of an allegation. An allegation not denied shall be considered admitted.

When SOMMER or JOHN DOE intends in good faith to deny only a part or a qualification of an allegation, SOMMER or JOHN DOE shall specify that part or qualification of the allegation and shall admit the remainder. SOMMER and JOHN DOE waive any affirmative defense not raised in the answer.

The officer presiding over the hearing may grant relief from the requirement to file an Answer for good cause shown.

Dated this 25th day of February, 2003.

/s/ Mark Sendrow

Mark Sendrow
Director of Securities